Supreme Court, U.S.
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No. 01-842

IN THE

Supreme Court of the United States

DILLARD DEPARTMENT STORES, INC.,
Petitioner,

v.

PAULA DARLENE HAMPTON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JACK L. WHITACRE
ELAINE D. KOCH
SPENCER FANE BRITT & BROWNE LLP
1400 Commerce Bank Building
1000 Walnut Street
Kansas City, Missouri 64106
(816) 474-8100

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
LUISA CARO
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

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REPLY IN SUPPORT OF CERTIORARI

In Dillard's petition for certiorari, we explained (Pet. 13-22) that the decision below implicates a well-developed conflict among the courts of appeals as to the proper legal standards that govern whether conduct violates the "make and enforce contracts" provision of 42 U.S.C. § 1981. Further, because this conflict concerns the uniform interpretation of the Nation's civil rights laws—a recurring issue of unquestioned importance—Dillard's submitted that this case warranted further review by this Court. Pet. 23-24.

Respondent's Brief in Opposition ("Opp.") makes three arguments to avoid these conclusions. First, Hampton tries to divert attention from the relevant legal issues by peppering her brief with arguments regarding the jury's purported finding of a "pervasive policy and practice of discrimination" that have no bearing on the resolution of the legal issue presented by the holding below. Opp. i, 2-4 & nn.3-4. Second, Hampton erroneously asserts that review should be denied because all of the courts of appeals are "'aligned,'" *id.* at 11, and that the decision below merely "embrace[s]" this settled body of law. *Id.* at 13. Finally, Hampton argues that this case involves no recurring issue of national importance. *Id.* at 19. What these arguments cannot undermine is the core fact that, if Hampton's claim had been brought in the Fifth, Seventh or Eighth Circuits, it would have been dismissed. It is that fact that warrants this Court's attention.

1. Contrary to the thrust of respondent's opposition (and her rewrite of Dillard's question presented), Dillard's does not seek review of the trial rulings that formed the basis of its request below for a new trial on the issue whether Officer Wilson's *subjective* decision to conduct a brief investigative stop was motivated by Hampton's race or was part of a

"pervasive policy and practice of discrimination." Opp. i.[1] Instead, Dillard's seeks review of whether the court below adopted an appropriate legal standard for determining whether the conduct about which Hampton complained violated her right to "make and enforce contracts," 42 U.S.C. § 1981(a), and justified the heart-stopping $1.15 million compensatory and punitive award, see Pet. i.

As to that question, Hampton purports not to quarrel with the numerous courts that have determined that Section 1981 does not extend to "the mere expectation of being treated without discrimination in shopping." Opp. 11 (internal quotation marks omitted). Indeed, Hampton acknowledges that the district court bifurcated the trial so that the issue of whether Dillard's violated Hampton's right to "make and enforce" her contract would be resolved without reference to any testimony regarding "racial discrimination." *Id.* at 5. Nevertheless, Hampton now seeks to make this case solely about race by arguing that certiorari should be denied on the contract interference issues because there was "overwhelming evidence that [Dillard's] engaged in racial discrimination." *Id.* at 19.[2] That argument, however, merely underscores the error committed by the court of appeals in conflating the issue of contract interference with the issue of race discrimination.

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[1] For example, in its motion for a new trial, Dillard's explained that "'the bulk of the evidence produced by plaintiff at trial was unrelated to Officer Wilson, plaintiff, or the time period when the alleged intentional discrimination took place.'" Pet. App. 66a. Although Dillard's disagrees with the lower courts' resolution of these issues, it has never contended that these fact-intensive questions warrant exercise of this Court's discretionary review.

[2] Thus, Hampton contends that (a) an "all-white jury" concluded that "'race was a motivating factor'" in the "'conduct'" of Wilson, Opp. at 6, (b) there was "overwhelming evidence that at this store Dillard's had a policy and practice of discriminating against African-American shoppers," *id.* at 1, and (c) "this Dillard's store had a long-standing policy and practice of targeting black and other racial minorities for security surveillance, stops, and searches," *id.* at 2-3.

In doing so, the holding below conflicts with other courts of appeals by predicating liability under Section 1981 not upon proof of the loss of an actual contract right, but upon evidence that respondent was subjected to conduct (surveillance, an investigative stop and an accusation of shoplifting), Pet. App. 32a, 33a-34a, that did not deprive her of any right to the "'free cologne sample'" at issue, *id.* at 2a.

The absence of any loss of contractual right from this conduct follows directly from the district court's determination that Hampton "did not attempt to redeem the fragrance coupons after the encounter because ... 'it wasn't a concern to her.'" Pet. App. 89a-90a. Hampton seeks to avoid this fact by accusing Dillard's of "selectively quot[ing] from Ms. Hampton's deposition testimony." Opp. 4 n.4. But this uncontraverted finding comes directly from the district court's own assessment of the record in its summary judgment order, Pet. App. 89a-90a, and was accurately quoted by Dillard's, *e.g.*, Pet. 3. In ruling against Dillard's, the court of appeals plainly relied upon *both* the "trial transcript" *and* "the district court's orders" to compile its statement of "material facts." Pet. App. 3a. But even without this admission, the holdings below required *no* evidence that Hampton suffered an actual loss of a contractual right, because her right "to a free cologne sample" both before and after the investigative stop was precisely the same.

Recognizing that fact, Hampton argues that she never sought to obtain her fragrance coupon after the investigative stop because, "as a result of the discrimination," she was "too upset, humiliated, and embarrassed by the incident to complete her shopping." Opp. 5 n.4. The court of appeals employed a similar legal analysis, relying upon testimony that Hampton had been accused of shoplifting to support the jury's compensatory award, Pet. App. 32a, and testimony regarding "the coding and close surveillance of African-American shoppers" to support the punitive award, *id.* at 35a. But, as dissenting Judge Anderson explained:

> all of the evidence indicates that it was the wrongful accusation of shoplifting . . . which caused Ms. Hampton's alleged injuries. But § 1981 does not provide a remedy for the wrongful accusation of shoplifting, absent some interference with a contract benefit.

Id. at 46a. Simply put, the court of appeals justified the jury's substantial compensatory and punitive awards based upon conduct (*i.e.*, surveillance, a brief investigative stop, and an accusation of shoplifting) which, although unpleasant for respondent, did not result in the loss of a contractual right to a "free cologne sample," and therefore could not have violated Section 1981 as interpreted by a majority of the courts of appeals that have addressed the question. See Pet. 13-16.

2. Nevertheless, respondent argues that the court of appeals stated that its decision was "'aligned with all the courts that have addressed the issue,'" Opp. at 11-12 (quoting Pet. App. 38a), and thus insists that "the decision below does not conflict with the decision of any other court." *Id.* at 11. Both arguments are wrong.

a. First, Hampton's reference to the statement from the decision below is misleading because it comes from a section of the court of appeals' decision, not challenged here, where the court affirmed the judgment against Hampton's co-plaintiff Cooper on her Section 1981 claim because Cooper never established "a contractual relationship" with Dillard's. Pet. App. 38a. That unremarkable ruling is irrelevant to the question presented because there is no longer any dispute that Hampton had a contractual right to a "free cologne sample." The issue here is whether the court applied the appropriate legal standard to determine if Dillard's had interfered with Hampton's right to "make and enforce" that contractual right. On that issue, the legal standard employed by the court below cannot be reconciled with that of other courts of appeals.

b. At bottom, this case implicates a mature circuit conflict because Hampton could not have prevailed if her case were decided under the standards applied by the Seventh, Fifth and Eighth Circuits. Thus, in *Morris* v. *Office Max, Inc.*, 89 F.3d 411 (7th Cir. 1996), the Seventh Circuit explained that, in the retail setting, a Section 1981 claim is viable only if a customer is denied "admittance" or "service," or "asked to leave the store." *Id.* at 414. Although Hampton argues that the decision below "expressly relied on *Morris*," Opp. 13, both the decision below and Hampton ignore this part of the Seventh Circuit's ruling. That omission is telling because there simply was no evidence that Hampton was denied "admittance" or "service" or was "asked to leave the store." Instead, the court below reasoned that the brief investigative stop resulted in an "interruption," which it equated with "an actual loss of a privilege of her contract." Pet. App. 16a. But Hampton's right "'to a free cologne sample,'" *id.* at 2a, was left unchanged by the brief investigative stop.[3]

Nor can Hampton reconcile the decision below with the Seventh Circuit's subsequent ruling in *Bagley* v. *Ameritech Corp.*, 220 F.3d 518 (7th Cir. 2000). In *Bagley*, the court of appeals held that a plaintiff who was flatly denied service by one employee failed to state a Section 1981 claim because he subsequently could have completed the transaction through another sales representative. *Id.* at 520. The *Bagley* court made clear that the critical issue under Section 1981 is "whether [the defendant] refused to contract with [plaintiff], or [whether] [plaintiff] opted not to contract with [defendant]." *Id.* at 521. Applied here, Hampton could not

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[3] Hampton now argues that she "understood Mr. Wilson as conveying the message that she needed to leave the store." Opp. 5 n.4. That claim is specious. The record makes clear that, after the stop, Hampton "proceeded to the customer service counter," Pet. App. 5a, and, after filing a complaint, more than an hour later, she returned to the store's fragrance counter. Aplt's App. 625.

have recovered because she presented no evidence that she would have been denied her fragrance sample if she had asked for it either immediately after the investigative stop or when she later returned to the fragrance counter. Aplt's App. 625. Indeed, despite the opportunity to exercise her contractual right to the free cologne sample, the district court noted that Hampton failed to request it because it "'wasn't a concern to her.'" Pet App. 90a. Hampton's argument that she had no interest in redeeming the fragrance sample after the brief investigative stop, Opp. 4 n.4, is no different than the claim, rejected in *Bagley*, that the inability to obtain service from a single clerk was sufficient to establish a loss of a contract under Section 1981.

Although Hampton relegates it to a footnote, Opp. 15 n.10, the Fifth Circuit's most recent decision in *Morris* v. *Dillard Department Stores, Inc.*, No. 00-30710, 2001 WL 1650937 (5th Cir. Dec. 26, 2001), also conflicts with the decision below. There, the Fifth Circuit held that a plaintiff who was arrested for shoplifting and banned from the store failed to state a claim under Section 1981 because the plaintiff did not establish any "contractual duty between her and the merchant" that "was in some way thwarted." *Id.* at *5. Here, the brief investigative stop did not "thwart" Hampton's contract right to a free cologne sample. Rather, after the investigative stop, Hampton remained in the store and returned to the fragrance counter but never asked for her "free cologne sample." Pet. App. 90a.

Finally, Hampton contends that *Youngblood* v. *Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (8th Cir. 2001), is distinguishable, arguing that the "outcome in *Youngblood* turned on facts not presented here." Opp. 15. Specifically, Hampton argues that the confiscation of the product in *Youngblood* occurred *after* plaintiff "had already completed his purchase." *Id.* at 16. But here, because Hampton also had completed her purchase of the clothing, under that logic, Dillard's could have confiscated both the clothing and the

fragrance coupon based upon its probable cause of shoplifting without incurring any Section 1981 liability. If confiscation of her purchase would not state a claim under Section 1981, then a brief investigative stop that left Hampton with the clothing she purchased as well as her right to a free cologne sample could not either. In all events, seven-figure liability under Section 1981 should not be made to depend upon the "purely fortuitous" timing of an investigative stop that results in no loss of a plaintiff's contractual right.

c. Hampton's effort to reconcile the decisions of the courts of appeals also fails with respect to rulings, like the one below, that have adopted more sweeping standards for assessing liability under Section 1981. In doing so, the Opposition confirms that the decision below embraced a standard plainly in conflict with the decisions of the Seventh, Fifth and Eighth Circuits.

Specifically, Hampton cites with approval a district court's conclusion that the legal standards applied in *Hall* v. *Pennsylvania State Police*, 570 F.2d 86 (3d Cir. 1978), and those applied in this case "are entirely consistent." Opp. 18 (internal quotation marks omitted). But in *Hall*, the Third Circuit reversed the district court's ruling that the practice of photographing African-American customers as they entered a bank did not violate Section 1981 "because plaintiff did not allege deprivation of any contractually related right because of race." 570 F.2d at 89. Instead, the Third Circuit adopted a broader view, ruling that plaintiff stated a claim under Section 1981 because "upon entering the premises to transact business, his photograph was taken . . . pursuant to a racially based surveillance scheme." *Id.* at 92. But, that holding cannot be reconciled with decisions of other courts of appeals that have ruled that "Section 1981 does not provide a general cause of action for race discrimination." *Youngblood*, 266 F.3d at 855; see also *Morris*, 89 F.3d at 114-15; *Bagley*, 220

F.3d at 521; *Morris*, 2001 WL 1650937, at *5-*6.[4] Hampton's argument that the decision below is "entirely consistent" with *Hall* confirms that the decision below implicates a conflict among the courts of appeals. Just as in *Hall*, the court of appeals justified liability under Section 1981 based not upon the loss of a contract right, but upon "coding and close surveillance" of customers unrelated to any loss of a contractual interest. Pet. App. 35a. Indeed, one district court in the Tenth Circuit already has adopted this view of the decision below, explaining that the *Hampton* court predicated liability under Section 1981 based on conduct "totally removed from the contractual relationship." See *Kelly* v. *Bank Midwest, N.A.*, No. 00-2042-JWL, 2001 WL 1597967, at *15 (D. Kan. Nov. 26, 2001).

Finally, Hampton's argument with respect to *Christian* v. *Wal-Mart Stores, Inc.*, 252 F.3d 862 (6th Cir. 2001), simply misses the mark. Although *Christian* does indeed address the elements of a *prima facie* case of discrimination as Hampton's opposition notes, it makes clear that in the Sixth Circuit, a plaintiff may recover not only if she were "deprived of services while similarly situated persons outside the protected class were not," but also when she actually "received services" but "in a markedly hostile manner and in a manner that a reasonable person would find objectively discriminatory." *Id.* at 874. Thus, the importance of *Christian* is that it does not require—as the Seventh, Fifth, and Eighth Circuits do—the actual loss of a contract right.

As in *Hall* and *Christian*, the court of appeals below conflated the issue of discrimination with the issue of actual

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[4] In her opposition, Hampton simply dismisses the actual holding in *Hall* as merely reflecting "imprecise" language, without ever identifying what language she believes to be imprecise. Opp. 18 n.12. The further argument that *Hall* was decided before the Civil Rights Act of 1991, *id.*, ignores that the 1991 amendments did not alter the "contract" requirement of Section 1981.

loss of a contractual right, and, in doing so, deepened an existing conflict with the Seventh, Fifth and Eighth Circuits.

3. Finally, Hampton contends that certiorari should be denied because, in her view, this case involves "no recurring issue of national importance." Opp. 19. She does not dispute that the uniform interpretation of the Nation's civil rights laws is an important and recurring issue that warrants this Court's review. Instead, her argument is predicated upon the mistaken view that there is no conflict among the courts of appeals and therefore this case "involves [no] unsettled legal issues." *Id.* But that argument fails, as demonstrated above, because there is a conflict among the courts of appeals *and* this case squarely presents it for resolution. Hampton's related argument that further review is not necessary to avoid a "patchwork of procedures and protocols" by retail establishments also is based upon her mistaken view that all of the courts of appeals are aligned. Further review by this Court therefore is warranted to prevent recovery under Section 1981 from depending solely on the fortuity of geography. See Pet. 23-24.

Hampton next argues that the "factual minutiae of this case"—*e.g.*, the "negligible value" of the free fragrance sample, and the "fortuitous timing" of the Wilson's "brief investigative stop," Opp. 19—render this a poor candidate for this Court's review. But these facts merely highlight, as Senior Judge Anderson noted, that Hampton's alleged injuries in this case were not based upon any loss of a contractual interest, but on a "wrongful accusation of shoplifting" for which Section 1981 "does not provide a remedy." Pet. App. 46a. Dillard's does not dispute that Section 1981 protects contractual rights, both large and small, from actual loss, but the "negligible value" of the cologne sample, coupled with the "brief investigative stop," underscore that the conduct about which Hampton complains did not cause her to lose her contractual right to a "free cologne sample"; rather, given the "negligible" value of the cologne sample and the "brief" stop,

respondent merely abandoned a contract right that was no longer "'a concern to her.'" *Id.* at 90a.

Finally, Hampton argues that the existence of objective "probable cause" to make the stop is irrelevant, Opp. 21, as is the issue of whether Officer Wilson had the "subjective intent to interfere with the transaction," *id.* at 22. As to the latter point, respondent argues that reliance upon subjective intent is unprecedented, but this Court already has held that liability under Section 1981 requires a finding of "purposeful discrimination." *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 391 (1982). And, as to the issue of objective probable cause, and the defense that it provides under state law, respondent argues that these matters are irrelevant because "both lower courts recognized" that this "state-law determination at the summary judgment stage was not determinative of the Section 1981 claim." Opp. 21 n.14. But this does not undo this Court's "reluctan[ce] to federalize" matters traditionally covered by state common law. *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 479 (1977). Nor does it answer Dillard's showing that this case "implicates important questions regarding the division of authority between Federal and State government." Pet. 24.

The point is that courts should be reluctant to impose multi-million dollar liability under federal law in circumstances when state law seeks to shield a defendant from all liability. The extraordinary award rendered in this case to remedy a right that "wasn't a concern" to respondent indicates strongly that federal law has been stretched beyond its meaning and has led to an outcome that would have been overturned in three other circuits.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JACK L. WHITACRE
ELAINE D. KOCH
SPENCER FANE BRITT & BROWNE LLP
1400 Commerce Bank Building
1000 Walnut Street
Kansas City, Missouri 64106
(816) 474-8100

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
LUISA CARO
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

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